13

No. 06-480

Supreme Court, U.S.
FILED
JAN 2 2 2007
OFFICE OF THE CLERK

In The
Supreme Court of the United States

LEEGIN CREATIVE LEATHER PRODUCTS, INC.,

Petitioner,

v.

PSKS, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF PING, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

RAWLEIGH H. GROVE
WILLIAM S. GATES
LANCE L. VAN HOUTEN
PING, INC.
2201 West Desert Cove
Phoenix, Arizona 85029
(602) 687-5000

AARON S. BAYER
ROBERT M. LANGER
SUZANNE E. WACHSSTOCK
WIGGIN AND DANA LLP
One City Place
185 Asylum Street
Hartford, Connecticut 06103
(860) 297-3700

DAVID A. VAN ENGELHOVEN
THE CAVANAGH LAW FIRM, P.A.
1850 North Central Avenue
Phoenix, Arizona 85004
(602) 322-4000

THOMAS C. WALSH*
BRYAN CAVE LLP
One Metropolitan Square
211 North Broadway
St. Louis, Missouri 63102
(314) 259-2000

LAWRENCE G. SCARBOROUGH
J. ALEX GRIMSLEY
BRYAN CAVE LLP
Two North Central Avenue
Phoenix, Arizona 85004
(602) 364-7000

Counsel for Amicus Curiae

**Counsel of Record*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. PING UNILATERALLY ADOPTED ITS PRICING POLICY FOR PROCOMPETITIVE REASONS 5

II. TO MINIMIZE ITS RISK OF LIABILITY UNDER *DR. MILES*, PING MUST TAKE EXTRAORDINARY AND INEFFICIENT MEASURES TO ADMINISTER ITS PRICING POLICY THAT HARM, RATHER THAN BENEFIT, CONSUMERS 9

A. The Current Law Severely Limits PING's Ability To Communicate With Its Retailers Regarding The *i*FIT Pricing Policy 11

B. The Current Law Requires PING To Take Uniform And Drastic Action Against Retailers, With No Benefit To Consumers 15

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES:

324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987) 8

Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) 8

Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) ..... *passim*

Helicopter Support Sys., Inc. v. Hughes Helicopter, Inc., 818 F.2d 1530 (11th Cir. 1997) 10

Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984) 5, 9

Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958) 19

State Oil Co. v. Khan, 522 U.S. 3 (1997) 9, 19

The Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148 (9th Cir. 1988) 10

United States v. Colgate & Co., 250 U.S. 300 (1919) ..... *passim*

STATUTES AND RULES:

Sup. Ct. R. 37.6 1

INTEREST OF *AMICUS CURIAE*

PING, Inc. submits this brief *amicus curiae* to provide a unique, real-world view of the extraordinary lengths to which a company must go to implement and administer a vertical minimum resale pricing policy that complies with *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), and *United States v. Colgate & Co.*, 250 U.S. 300 (1919). In 2004, PING unilaterally adopted, and since has unilaterally administered, a vertical minimum resale advertising and pricing policy, referred to as the PING "*i*FIT Pricing Policy." PING developed the *i*FIT Pricing Policy to ensure that its retailers have the resources and incentives necessary to service and custom fit consumers who choose to purchase PING's golf products.[1]

Since PING adopted the *i*FIT Pricing Policy in 2004, it has:

- Spent several million dollars to administer the Policy;
- Employed as many as 12 full-time people to administer the Policy;
- Unilaterally terminated nearly 1,000 PING retailers that violated the Policy – retailers that had generated millions of dollars of revenue for PING prior to their closures; and

[1] Letters of consent to the filing of any and all *amicus curiae* briefs have been filed with the Clerk by petitioner and respondent. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6.

- Strained its relations with PING retailers and the golfing community in general through its enforcement of the Policy.

PING continues the *i*FIT Pricing Policy, despite these burdensome consequences, because it allows PING to provide its unique products and services to its customers and to preserve its brand, and its special niche, in the highly competitive golf-equipment marketplace.

The purpose of this brief is to demonstrate the advisability of allowing companies like PING to enter into an agreement with retailers regarding the minimum price that can be charged for their products – an agreement that would be subject to a rule of reason analysis as to its legal propriety, and evaluated by the marketplace as to its economic viability. Allowing manufacturers to enter into such agreements with retailers would enhance consumer choice and eliminate the uncertainties and inefficiencies associated with the current, law-driven focus a manufacturer must employ to avoid even a "perception" of a pricing agreement between it and its retailers.

Other *amici*, including distinguished economists and associations of affected businesses, have presented or will present a comprehensive review of the relevant legal theories and economic issues raised by the current law. PING has elected to share this overview of important details of its *i*FIT Pricing Policy through this brief *amicus curiae* because it believes that reviewing a living *Colgate* program will assist the Court in its reevaluation of the *per se* rule against vertical minimum resale price maintenance agreements and demonstrate why the status quo should not be maintained.

SUMMARY OF THE ARGUMENT

Experience has taught PING that, to ensure sufficient incentive for retailers to provide consumers the level of service on which PING has built its brand, and to prevent free riders, the minimum resale price of its products needs to be protected. Under the rule of *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), PING cannot protect the resale price of its products by entering into an agreement with a retailer to set the minimum price at which the retailer will resell PING's products. Under *United States v. Colgate & Co.*, 250 U.S. 300 (1919), however, PING may try to achieve that result by unilaterally establishing and announcing a retail price list and then summarily terminating retailers that sell below the listed prices. PING unilaterally adopted, and unilaterally administers, its *i*FIT Pricing Policy to comply with these century-old precedents.

As detailed below, to ensure that none of its nearly 10,000 retailers incorrectly imply or conclude that they have entered into any "agreement" with PING regarding the *i*FIT Pricing Policy, PING has adopted numerous, detailed internal procedures, compliance with which is costly and inefficient. In particular, all but a very small group of PING's employees are subject to termination if they communicate in any way with retailers or others about the Policy. Communications from retailers to PING regarding the *i*FIT Pricing Policy are not addressed by marketing professionals; they are funneled instead to antitrust attorneys and paralegals. These individuals handle the delicate and awkward task of dealing with questions and/or comments from often-irate retailers. Each conversation is carefully worded to avoid any suggestion of, or even an unintended perception of, any "agreement."

These efforts are undertaken at great expense to PING. Rather than contributing to the quality of PING's products, the efficiency of its production systems, the development of new products to increase consumer choice, or the provision of consumer services, these measures serve *only* to help PING avoid an antitrust lawsuit.

Aside from the extraordinary costs in labor and oversight, PING's efforts to ensure compliance with *Dr. Miles* and *Colgate* also inject significant and unnecessary strain into PING's relationship with its retailers. For example, if a retailer, unwittingly or otherwise, violates the *i*FIT Pricing Policy, PING does not confer with the retailer to discuss corrective measures. Rather, to avoid any appearance of the sort of "agreement" on which current law fixates, PING's *i*FIT Pricing Policy requires termination of the retailer's account. Since 2004, PING has terminated summarily nearly 1,000 accounts that have violated the Policy even though this "zero tolerance" approach has meant the loss of some of its most successful and popular retailers, with the consequent reduction in the number of outlets at which consumers can obtain PING products.

In sum, PING's *i*FIT Pricing Policy, developed to protect its brand and promote interbrand competition, unnecessarily restricts communication with retailers, damages PING's relationships with retailers and consumers, and creates significant costs and inefficiencies – all because of the need to ensure compliance with *Dr. Miles* and *Colgate* in order to avoid potential *per se* antitrust liability. These effects hurt PING and its retailers and *limit* consumer choice. PING offers golf consumers a real choice – the custom fitting of clubs by PING retailers – that it cannot effectively accomplish without a minimum

resale pricing policy. The antitrust laws should promote, not hinder, this type of non-price competition offered for the benefit of consumers. *Dr. Miles*, therefore, should be overruled.

ARGUMENT

I. PING UNILATERALLY ADOPTED ITS PRICING POLICY FOR PROCOMPETITIVE REASONS.

This Court has long recognized that there are sound economic reasons for manufacturers to want to influence the resale prices of their retail distributors:

> The manufacturer often will want to ensure that its distributors earn sufficient profit to pay for programs such as hiring and training additional salesmen or demonstrating the technical features of the product, and will want to see that "free-riders" do not interfere.

Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 762-63 (1984). It was precisely these kinds of procompetitive factors that led PING to adopt its minimum resale pricing policy, referred to as the *i*FIT Pricing Policy.

Nearly 50 years ago, Karsten Solheim, PING's founder, recognized that consumers should have more, and better, choices when purchasing golf clubs. Working from his garage, Karsten developed what became the PING 1-A Putter, and not long after, Karsten's innovative designs began to change the golf industry. Karsten, his family (which continues to own and operate PING), and the many employees since hired by his company (which now employs roughly 1,000 people), pioneered custom fitting, perimeter

weighting, and other innovations that have greatly added to consumer choice, and have contributed mightily to the game of golf.

As a result of these efforts over the past half-century, the PING brand is now widely recognized as representing innovation, quality, and service, allowing PING to succeed in the extremely competitive golf-equipment marketplace. This success, in turn, affords PING the tools it needs to continue to innovate and to provide golfers with more, and better, choices when purchasing golf clubs and other golf equipment.

Custom fitting has been a key to PING's competitive success. Over the years PING has developed, and improved upon, numerous processes and products that assist a retailer in properly fitting a golfer with PING equipment tailored to that golfer's individual game, regardless of his or her skill level. PING has trained thousands of retailers, bringing them to its Phoenix, Arizona, factory to attend custom-fitting courses. PING also devotes enormous time and resources to educating retailers about PING products, new technologies, and its custom fitting manufacturing process and quality controls. PING believes that retailers that invest their time and resources learning about its products, and in training to be excellent custom fitters, will be better prepared to compete successfully in this key area of customer service. As a result of these efforts, consumer surveys have repeatedly ranked PING as the leader in custom fitting.[2]

---

[2] A PING custom fitting identifies which, of the more than one million custom manufacturing possibilities PING can deliver, is the right one for each individual golfer. An iron and wedge fitting session

(Continued on following page)

Several years ago, free rider activity and other retail behavior, exacerbated by internet sales, began to threaten the hard-earned reputation of the PING brand, diminishing the demand for its products, and harming PING consumers. For example, some price-cutting PING retailers were advising consumers to visit a retailer that had invested in PING's custom-fitting program, request a custom-fitting session, and then take the specifications for the custom-made PING clubs back to the discounter for a "great deal," financed by the investments and efforts of the servicing dealer that performed the custom fitting. PING recognized that if such activities were allowed to continue unabated, most, if not all, of PING's retailers would lose any incentive to perform custom fittings and other services that are key to the PING brand and its ability to compete in the marketplace. By 2004, PING's revenues reflected these harmful activities.

---

requires 30 to 60 minutes to evaluate properly each golfer's physical characteristics and swing in arriving at the golf club specifications unique to that golfer. The fitting involves: an **interview process** (to identify the golfer's current and desired ball flight); **static measurements** (height and other physical measurements necessary to calculate a starting point for club length, lie angle, and grip size); **a dynamic swing test** ("impact tape" is applied to the sole of the club, and the marks left on the tape are used to calculate the proper loft and lie angles); **ball flight observations** (ball flight is observed to determine the final lie angle specifications – which will minimize the chance that the golfer hits shots that miss left or right of the intended target); and **performance monitor** (the PING "Performance Scoresheet" is employed to identify any changes to the golfer's shot making patterns). As a result of this technical and time-intensive effort, PING customers who have been custom fitted receives the precise clubs that will allow them to "play their best," and obtain all of the value built into PING golf clubs.

PING determined that it could address this problem by ensuring that its retailers had sufficient economic incentive "to provide service and repair facilities necessary to the efficient marketing of their products." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 55 (1977) (acknowledging procompetitive benefits of vertical restrictions and observing that absent such restrictions, "[b]ecause of market imperfections such as the so-called 'free rider' effect, these services might not be provided by retailers"). Under existing law, PING's only option was to adopt a unilateral *Colgate* pricing policy. PING did so, and in the summer of 2004 informed PING retailers of the *i*FIT Pricing Policy, announcing to its retailers that it would close accounts that advertised or sold certain new PING products for a price less than that identified by PING.[3]

The *i*FIT Pricing Policy is essential to PING's ability to provide its unique products and services to its customers and, thus, to its very ability to engage in this form of interbrand non-price competition. *See, e.g., 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 341-42 (1987) (recognizing "the possibility that a vertical restraint imposed by a *single* manufacturer or wholesaler may stimulate interbrand competition even as it reduces intrabrand competition") (citation omitted). PING, like many other businesses throughout the country, is proud to employ American workers in its manufacturing operations. Given its relatively

[3] A central feature of the *i*FIT Pricing Policy is the "Orange & Blue List" on which PING sets forth its unilaterally established minimum advertising and resale prices for particular new PING products. In the *i*FIT Pricing Policy, PING also unilaterally announced that it would close accounts that sold certain PING products from web sites (with the exception of sales by a handful of PING Authorized Internet Retailers from web sites previously approved by PING).

small size as compared to its largest competitors, PING has chosen not to compete solely on the basis of price, with its attendant focus on cost reduction and the potential for exporting manufacturing jobs and other functions overseas. The *i*FIT Pricing Policy enables PING and its retailers to engage in non-price competition that enhances consumer choice and interbrand competition. *See State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997) (the "primary purpose of the antitrust laws is to protect interbrand competition").

II. TO MINIMIZE ITS RISK OF LIABILITY UNDER *DR. MILES*, PING MUST TAKE EXTRAORDINARY AND INEFFICIENT MEASURES TO ADMINISTER ITS PRICING POLICY THAT HARM, RATHER THAN BENEFIT, CONSUMERS.

Colgate recognizes PING's right unilaterally to establish prices for its products and to refuse to deal with retailers that fail to comply with its *i*FIT Pricing Policy. *E.g., Colgate*, 250 U.S. at 307 ("[T]he [Sherman] [A]ct does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell."); *see also Monsanto*, 465 U.S. at 761 ("Under *Colgate*, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination.").

Proponents of maintaining the *per se* illegality of all vertical minimum retail price maintenance agreements tout the "freedom" that *Colgate* supposedly provides as a "vehicle for manufacturers to lawfully exercise some

control over resale prices." Respondent's Brief in Opposition, No. 06-480, 2006 WL 3244036, at *9 (filed Nov. 6, 2006). Others have touted the advantage of a supposed "bright-line" rule. In fact, PING's actual experience shows that this freedom and clarity are not easily attained, in view of the extraordinary measures a company must take to administer a minimum pricing policy in the legal minefield created by *Colgate* and its progeny.[4]

To minimize the risks created by *Colgate*, PING drastically restricts employees' communications with the retailers to whom they sell and, worse, summarily terminates retailers for even the smallest policy violations, without considering whether the violation was intentional or why it occurred. PING employs as many as 12 full-time people who work on the *i*FIT Pricing Policy and related matters and has spent millions of dollars on the administration of the Policy since 2004. These measures and investments do not increase consumer choice, trigger innovation, or otherwise benefit consumers or competition – the ultimate concerns of the antitrust laws. To the contrary, they impose great costs on PING, its retailers, and consumers, most of which could be avoided if PING

---

[4] *Compare, e.g., The Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148 (9th Cir. 1988) (insufficient evidence of agreement to create jury question where manufacturer enforced suggested price policy, distributor threatened to cease purchasing goods from manufacturer unless price-cutting competitor was terminated, and representative of manufacturer reported to complaining distributor that he would "take care of things," then terminated discounter), *with Helicopter Support Sys., Inc. v. Hughes Helicopter, Inc.*, 818 F.2d 1530 (11th Cir. 1987) (sufficient evidence to go to jury where competing dealer complained about price-cutting plaintiff, manufacturer terminated plaintiff and advised complaining dealer of the termination, in response to which complaining dealer sent "thank you" letter to manufacturer).

were allowed the option to enter into pricing agreements with its retailers evaluated under the rule of reason.

A. The Current Law Severely Limits PING's Ability To Communicate With Its Retailers Regarding The *i*FIT Pricing Policy.

In order to avoid any discussion that might arguably be characterized as an agreement, PING funnels all communication (written and oral) related to the *i*FIT Pricing Policy to one of its in-house lawyers or his staff, all of whom are trained with respect to antitrust issues. All other PING employees, including its Sales Representatives, who would be capable of addressing the legitimate questions retailers might have about the *i*FIT Pricing Policy, are instructed not to engage in communications with accounts on this subject.[5]

This environment engenders substantial frustration for PING's nearly 10,000 retail accounts, whose primary contact at PING is one of PING's Sales Representatives, when that Sales Representative refuses to answer questions about the *i*FIT Pricing Policy. PING believes it must impose such constraints to minimize the risk that one of its employees, who is not trained in the legal technicalities of *Dr. Miles* and *Colgate*, will unintentionally make a

[5] For example, retailers may question whether – without violating the *i*FIT Pricing Policy – they can charge for fitting and then credit the amount towards the purchase price without violating the Policy, whether they can give away free golf balls in connection with the sale of PING golf equipment without violating the Policy, or whether they can donate PING golf equipment to a charity without violating the Policy. For fear of crossing an otherwise amorphous line into agreement, all such questions are referred to PING's legal staff.

poorly worded comment that might create the misperception of a forbidden "agreement."

In fact, PING employees face termination if they initiate or engage in any communication with anyone outside of PING about any of the following topics: the *i*FIT Pricing Policy, any potential or actual violation of the Policy, the status of any terminated account, or the prices at which any PING account chooses to advertise or sell new PING products.[6] Further, if a retailer raises any of these topics, PING employees are instructed to provide a pre-printed card that states "I am prohibited from discussing this with you." The card informs the retailer of an "800" number which connects the retailer with lawyers and paralegals for answers to questions about the *i*FIT Pricing Policy. The card also identifies a web site where the retailer can access documents providing detailed answers to a variety of hypothetical situations and "Frequently Asked Questions" about the Policy.

When PING adopted the *i*FIT Pricing Policy in 2004, it required its Sales Representatives to hand-deliver a copy of the Policy to each of their assigned PING retailers and to inform the retailers that Sales Representatives are prohibited from discussing the Policy. The retailers were instructed instead to call the 800 number or consult the website in the event of questions. One PING retailer described these legalistic gymnastics as follows:

> And, when [my PING Sales Representative] originally brought this policy to us in 2004(?) it was the most bizarre presentation ever. He

[6] To date, five employees have been terminated for having violated this communication prohibition.

> handed it to me. I looked at it and tried to ask questions . . . all he kept saying was "I CAN'T TALK ABOUT PRICE" – "I CAN'T TELL YOU ANYTHING ABOUT THAT" . . . about 3 or 4 times I tried to ask different questions about it, but he couldn't or wouldn't talk about it. I felt left alone to fend for ourselves.[7]

As this comment makes clear, concern about the risks of violating *Dr. Miles* and *Colgate* distorts normal communications and substantially damages the retail relationships that PING Sales Representatives have worked hard to cultivate.

Nearly every business day, PING's in-house lawyer and his staff spend several hours drafting replies to emails that are carefully worded to avoid any perception of any agreement between PING and a retailer regarding retail prices. For example, if an email received from a retailer uses language that arguably could indicate that the retailer was attempting to "agree" with PING's *i*FIT Pricing Policy, PING provides a legally-driven, impersonal response that often frustrates retailers:

> I recognize that the questions you asked, and the information you provided, in your email are not in any way intended to indicate any approval, agreement or any other assurance of compliance with respect to the *i*FIT Pricing Policy. However, if that was in any way your intent, please note that it is, and always will be, expressly rejected by PING. PING specifically provides at Section II of the *i*FIT Pricing Policy that: "PING does not

[7] Letter from Joanne Schroeder of Highway #8 Golf Center to Bill Gates of PING, dated October 14, 2006.

> seek, and will not accept, any account's approval, agreement or any other assurance of compliance with respect to this *i*FIT Pricing Policy and/or the Orange & Blue List." You need to decide on your own what you charge for the PING products you sell.[8]

No procompetitive interest is served when PING's lawyers spend hours each day drafting emails filled with antitrust-driven disclaimers and qualifiers in response to simple questions from retailers.

Similarly, PING unilaterally observes the advertising and pricing practices of its retailers and will not accept or act on communications from a retailer providing information about the advertising or pricing practices of any other PING retailer. This ensures that PING is not perceived as acting in concert with one retailer regarding the account status of another retailer. PING typically responds to such communications by disregarding the information the retailer has provided:

> The reason I am responding is because PING employees are prohibited from discussing with you, among other things, your observations regarding the advertising, internet or pricing practices of other PING accounts. Because your August 15 email contains such an observation, the only copy of it kept by PING will be in my files, together with this response. . . . Thank you in advance for not including observations of this

[8] Email from Bill Gates of PING to Ken Horn of Pro Golf San Antonio, dated January 6, 2007.

> nature in your future communications with PING.[9]

Once again, such communications, driven solely by concern about legal risks under *Dr. Miles* and *Colgate*, serve only to undermine PING's longstanding relationships with its retailers and do nothing to enhance marketplace competition.

B. The Current Law Requires PING To Take Uniform And Drastic Action Against Retailers, With No Benefit To Consumers.

Under *Colgate*, PING cannot discuss, without risk, potential corrective measures with retailers, and it therefore enforces its *i*FIT Pricing Policy by terminating all retailers that violate PING's unilaterally set pricing terms – to its own detriment and that of retailers and consumers. PING does not warn its retailers when it becomes aware of a violation; it does not contact the retailer to investigate whether the violation was intentional; it does not consider how long that retailer has been a PING account or the size of the retailer's sales numbers. PING simply closes the account. In fact, PING has closed accounts with nearly *one thousand* PING retailers during the past 30 months. PING sold millions of dollars of golf equipment to these retailers the year before their closures.

As indicated, PING makes no exceptions in the administration of its *i*FIT Pricing Policy. If a retailer violates the Policy, it will be closed regardless of its identity, longevity, or volume of sales. For example, PING closed the

---

[9] Email from Bill Gates of PING to Tom Bell of Golf USA, dated August 22, 2006.

account of the country club in Phoenix once owned by PING, and which still serves as the home club of many PING employees, including its CEO and Chairman of the Board. PING also closed the accounts of several golf retailers located on military bases. These terminations led to significant negative media attention in outlets as varied as Golfweek, USA Today and The San Jose Mercury News.[10]

Absent the artificial requirements imposed by the current state of the law, many of PING's account closures might have been avoided, and consumers would not have suffered the attendant reduction in outlets offering the choice of PING products. If permitted to do so without fear of a *per se* violation of the Sherman Act, PING could choose whether to take further measures to educate PING retailers regarding the *i*FIT Pricing Policy, such as warning retailers who violate the *i*FIT Pricing Policy before summarily closing them or giving its retailers an opportunity to correct the violation before losing all access to PING products, a loss that harms not only the retailer, but all of its customers as well. All of these options present substantial risks, however, under the current antitrust regime.[11]

---

[10] *See, e.g.*, "Ping's pricing policy sparks PR fiasco," http://www.golfweek.com/pro/pro_other/287239709880948.php.

[11] A significant intangible cost that flows from PING's inability to issue warnings, or fully to discuss *i*FIT Pricing Policy issues with retailers, without incurring unacceptable legal risk includes the deep regret PING's executive management and sales force feel when these important relationships end in such a "legalistic" and abrupt fashion.

PING's strict enforcement of its *i*FIT Pricing Policy has created great consternation among retailers and consumers alike. As one of PING's closed retailers stated:

> Everything in this world is not black & white . . . as your policy would make one believe. We would never do anything intentionally and knowingly to hurt the PING brand. We just promote it, push it, and sell it. Closing our account for such a small misstep is like having your driver's license taken away for life because you got a parking ticket.[12]

Another PING retailer described its termination this way:

> No phone call, no warning, no one even asking me what had happened or our side of the story. I am still shocked that your company would end a 17 year relationship so easily and in such a "flippant" manner.[13]

Yet another retailer bemoaned PING's unwillingness to consider his track record as a PING retailer by noting the following:

> Our staff made a mistake. We readily admit to this. Doesn't loyalty run two-ways? Doesn't a twenty year history of consistent sales, prompt payment, and brand loyalty mean anything?[14]

---

[12] Letter from Jim Plowman of the Club House in Thousand Oaks, California, to John Solheim of PING, dated February 13, 2006.

[13] Letter from Rick Danruther of Sierra Lakes Golf Club to John Solheim of PING, dated November 7, 2006.

[14] Letter from Jim Roschek of Milham Park Golf Club to Bill Gates of PING, dated February 1, 2006.

Consumers, likewise, have been irritated and confused by the actions PING has taken to comply with *Dr. Miles* and *Colgate*. One consumer voiced his deep frustration in a recent internet discussion forum:

> So on the basis of a single mistake on a single product, they pull the account without warning? For good or just temporarily? Wouldn't the professional business like approach of been to warn the account holder and give them a timeframe to correct it?[15]

If the Court adopts a rule of reason standard for vertical minimum resale price agreements, companies like PING would have the option of entering into pricing agreements with retailers, would be able to discuss these agreements freely with retailers and consumers, and would be able to make reasonable decisions as to the enforcement of such agreements. Consumers would benefit because such pricing agreements would preserve a competitive option for them, PING's custom-fit clubs and customer service, without leading to precipitous closures of their local retail outlets.

* * *

Vertical minimum resale price agreements are a more efficient and procompetitive means of achieving the goals of PING's *i*FIT Pricing Policy – protecting a company's brand and enabling it to compete by offering customized products and service. Under no reasonable economic view of the world do such arrangements fall into that narrow

---

[15] *See* http://www.golfwrx.com/forums/index.php?showtopic=62735 (according to an e-mail received from a consumer who posted on this internet discussion forum, more than 3000 individuals have viewed that page and more than 140 posts have been made).

category of "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). Companies like PING that adopt resale pricing policies for procompetitive purposes should not be forced to damage their relationships with retailers and consumers, and limit consumer choice, in order to avoid risking *per se* liability. A better alternative, one that is consumer-oriented and market-driven, is to change existing law to apply the rule of reason to vertical minimum resale price agreements to allow companies like PING to enter into pricing agreements with retailers that would involve negotiation and the free flow of communication between a manufacturer and its retailers.

We acknowledge and appreciate the Court's reluctance to overrule existing precedent, but the rule of *stare decisis* should not serve as a roadblock to common sense. *See, e.g., State Oil*, 522 U.S. at 20-21 ("*[s]tare decisis* is not an inexorable command. . . . Accordingly, this Court has reconsidered its decisions concerning the Sherman Act when the theoretical underpinnings of those decisions are called into serious question. . . . ") (quotation and citation omitted). Where, as here, the very purpose of the antitrust laws is thwarted by precedent that is economically obsolete, the Court should not be reluctant to order a change.

CONCLUSION

This Court should reverse the decision of the Court of Appeals, overrule *Dr. Miles*, and hold that vertical minimum resale price maintenance agreements should be evaluated under the rule of reason.

Respectfully submitted,

RAWLEIGH H. GROVE
WILLIAM S. GATES
LANCE L. VAN HOUTEN
PING, Inc.
2201 West Desert Cove
Phoenix, Arizona 85029
(602) 687-5000

AARON S. BAYER
ROBERT M. LANGER
SUZANNE E. WACHSSTOCK
WIGGIN AND DANA LLP
One City Place
185 Asylum Street
Hartford, Connecticut 06103
(860) 297-3700

DAVID A. VAN ENGELHOVEN
THE CAVANAGH LAW FIRM P.A.
1850 North Central Avenue
Phoenix, Arizona 85004
(602) 322-4000

THOMAS C. WALSH*
BRYAN CAVE LLP
One Metropolitan Square
211 North Broadway
St. Louis, Missouri 63102
(314) 259-2000

LAWRENCE G. SCARBOROUGH
J. ALEX GRIMSLEY
BRYAN CAVE LLP
Two North Central Avenue
Phoenix, Arizona 85004
(602) 364-7000

Counsel for Amicus Curiae

January 22, 2007

**Counsel of Record*